COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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COMPETITION LAW IN THE EUROPEAN COMMUNITIES

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30th Report on Competition Policy: Statistics

On 15th May, the Commission published its 30th Annual Report on Competition Policy (that is, for the year 2000). It shows that the number of new cases in 2000 was 1,206, of which 564 were in the area of state aid control, 345 were merger notifications and 297 were antitrust cases. The overall figure remained broadly stable (1,249 cases in 1999). This reflects a drastic reduction of anti-trust notifications, following adoption of a number of block exemption regulations, offset by an increase of 18% in merger filings.

Types of Case	1999	2000
ANTI-TRUST		
Ex officio	77	84
Complaints	149	112
Notifications	162	101
Total Anti-Trust	388	297
MERGERS		
Notifications	292	345
Decisions	270	345
Approvals in First Phase	254	321
Decisions in Second Phase	10	17
Prohibitions	1	2
Total Mergers	292	345
STATE AIDS		
Unnotified Aid	98	86
Notified Aid	469	469
Total State Aids	569	564
TOTAL of all NEW CASES	1249	1206
TOTAL of all CASES CLOSED	1321	1209

According to the Commission, the reduction in the number of new anti-trust cases can mainly be attributed to the new block exemption on vertical restraints. A second factor in the reduction of new cases is the drop in the number of complaints. It is interesting to note that almost 30% of the new cases were opened *ex officio*. In absolute terms, moreover, *ex officio* procedures increased over the previous year. This development reflects the Commission's policy of dealing with standard agreements through legislative action, while using the available resources to pursue a more proactive policy and concentrate on the most dangerous anti-competitive practices. ■

[Further comment on the 30th Report will be carried in a forthcoming issue.]

COMMISSION NOTICE (ALL INDUSTRIES): DE MINIMIS RULES

Subject: De minimis rules
Agreements of minor importance

Industry: All industries

Source: Commission Statement IP/01/709, sated 16 May 2001

(Note. Under the rules on competition, as interpreted by the courts, practices are prohibited only if they "appreciably" restrict competition. The Commission's successive Notices on the circumstances in which practices do not, in its opinion, appreciably restrict competition, are known as the de minimis rules. The proposal referred to in the report below is designed to bring the 1997 Notice up-to-date in terms of recent developments in economic thinking and competition law, and in particular the latest block exemption regulations.)

The Commission has adopted a draft Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the EC Treaty (the de minimis Notice). The Commission has invited comments by 1st August, 2001, from industry, consumer organisations and other interested third parties. The revision of the de minimis notice is part of the Commission's review of the competition rules. By defining when agreements between companies are not prohibited by the Treaty, the Notice will reduce the compliance burden for companies, especially smaller companies. At the same time the Commission will be better able to avoid examining cases which have no interest from a competition policy point of view and will thus be able to concentrate on more important cases.

Article 81 of the EC Treaty prohibits agreements which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market. The Court of Justice of the European Communities has clarified that this provision is not applicable where the impact of the agreement on intra-community trade or on competition is not appreciable. In the present de minimis Notice the Commission quantifies, with the help of market share thresholds, what is not an appreciable restriction of competition. This does not imply that agreements between companies which exceed the thresholds set out in the Notice do appreciably restrict competition. Such agreements may still have only a negligible effect on competition within the common market; but this can be assessed only on a case-by-case basis. This assessment is relevant in particular for agreements which are in addition not covered by any of the block exemption regulations of the Commission.

The current de minimis Notice from 1997 needs to be made consistent with the new rules for vertical and horizontal agreements (that is, respectively, distribution agreements and agreements between companies operating at the same level of the production and distribution chain). The draft Notice reflects an economic approach and has the following key features.

First, the market share thresholds are raised from 5% to 10% for agreements between competitors and from 10% to 15% for agreements between non-competitors. In line with a more economic approach, it is proposed to raise the current thresholds below which agreements are considered to be de minimis. Where less serious restrictions exist (that is, restrictions not classified as "hardcore" – see below), competition concerns are unlikely to arise unless companies have a certain degree of market power. The proposed thresholds take account of this while at the same time staying low enough to be applicable whatever the overall market structure. This more economic approach fits in with the current practice of most Member States and of the Commission. To calculate the market share, it is necessary to determine the relevant market. This consists of the relevant product market and the relevant geographic market.

Second, the proposed Notice contains a 5% market share threshold for situations of cumulative effect. The current de minimis Notice (paragraph 18) excludes from its benefit agreements operated on a market where "competition is restricted by the cumulative effects of parallel networks of similar agreements established by several manufacturers or dealers." This means in practice that firms operating in sectors like the beer and petrol sector can usually not benefit from the de minimis Notice. The proposed Notice seeks to change this by introducing a special but lower market share threshold of 5% for markets where there are parallel networks of similar agreements.

Third, the proposed Notice contains the same list of "hardcore" restrictions, such as price fixing and market sharing, as in the horizontal and vertical Block Exemption Regulations. Agreements containing hardcore restrictions cannot benefit from the de minimis Notice. The current Notice contains a very wide hardcore list in the field of vertical restraints. The exclusion from the benefit of the current Notice of "vertical agreements which have as their object to confer territorial protection to the participating undertakings or third undertakings" (paragraph 11, current Notice) effectively excludes all restrictions on active and passive sales in any type of distribution agreement. For vertical agreements the new Notice takes over the hardcore list of the Block Exemption Regulation on vertical restraints, which allows certain sales restrictions in particular types of distribution agreements. For horizontal agreements the new Notice takes over the hardcore list of Block Exemption Regulation 2658/2000.

Fourth, under the proposed Notice, agreements between small and medium sized enterprises are in general de minimis. The draft Notice states that agreements between small and medium sized enterprises (SMEs) are rarely capable of affecting trade between Member States. Agreements between SMEs therefore generally fall outside the scope of Article 81(1). In cases covered by the new Notice, the Commission will not institute proceedings either upon application or on its own initiative. Where companies assume in good faith that an agreement is covered by the Notice, the Commissioner will not impose fines. Although not binding on them, the Notice also intends to give guidance to the courts and authorities of the Member States in their application of Article 81. ■

ABUSE OF DOMINANT POSITION (PACKAGING): THE DSD CASE

Subject: Abuse of dominant position
Complaints
Trade marks

Industry: Packaging
(Some implications for other industries)

Parties: Commission of the European Communities
Duales System Deutschland AG (Green Dot)

Source: Commission Statement IP/01/584, dated 20 April 2001

(Note. The interest of this case lies mainly in the fact that the Commission's objections to DSD's commercial practices were directed at the restrictions associated with the use of DSD's trade mark. Other aspects of the case were either accepted or, where they were covered by Article 81 of the EC Treaty, rather than Article 82, governing the abuse of a dominant position, deferred to a later decision.)

The Commission has adopted a decision finding that Duales System Deutschland AG (DSD), a company which created "The Green Dot" (Der Grüne Punkt) trade mark, is restricting competition by abusing its dominant position in the market for organising the collection and recycling of sales packaging in Germany. The decision is limited to one provision of DSD's trade mark agreement and does not call into question the existence and overall functioning of the DSD system. The Commission finds that, in certain cases, the payment system used by DSD puts its customers at a disadvantage and prevents the entry of competitors in the market concerned. The Commission believes that, as soon as DSD has taken measures to end its abusive behaviour, it will be able to adopt a favourable decision on the remaining agreements of the DSD system.

Commenting on this decision, the Competition Commissioner Mario Monti said that the Commission had a duty to ensure that markets remained open to competition, including new, deregulated markets like waste recovery, and that new entrants should not fall victim to a dominant undertaking's conduct. This decision would lead to an improved choice of service providers and lower costs for companies complying with their environmental obligations.

DSD is currently the only company which runs a countrywide system for the collection and recycling of sales packaging in Germany. It had a turnover of DM 4.2b in 1998. DSD itself does not collect the waste but uses local collecting companies. The German Packaging Ordinance, as well as EU Directive 94/62 on packaging and packaging waste, require manufacturers and distributors to take back, free of charge, used sales packaging from consumers at or near the point of

sale. Manufacturers and distributors which adhere to a comprehensive collection system like DSD are exempted from this obligation.

DSD enjoys an almost monopolistic position with a market share of at least 80%. At the moment, opportunities for competition through "self-management solutions" (where the take-back obligation can be delegated to third parties) exist only at the fringes of the market and the operators present cannot be compared to DSD in terms of commercial strength and market position. Against the background of this dominant position, it is of the utmost importance for the emergence of competition in the waste recovery market that there is unrestricted market access for alternative service providers.

The Commission has objected to a provision according to which DSD customers have to pay fees corresponding to the volume of packaging bearing the Green Dot trade mark rather than fees corresponding to the volume of packaging for which DSD is actually providing a take-back and recycling service. According to the Commission, DSD abuses its dominant position when it claims the full fee for use of its Green Dot trade mark in situations in which it provides no service because the collection and recycling is carried out by competitors. The underlying principle followed by the Commission is "no service, no fee". Several companies had expressed concerns about DSD's practices.

In the Commission's view, the licence fee requirement means that customers have no realistic economic possibility of contracting with competitors of DSD. While paying for the service provided by DSD's competitors, these customers would either have to pay an additional fee to DSD (the only provider, at present, of a comprehensive countrywide system), or organise separate packaging, distribution and merchandising lines (packaging with and without the Green Dot).

The Commission therefore came to the conclusion in its decision that the payment system operated by DSD represented an abuse of a dominant position within the meaning of Article 82 of the EC Treaty. Under the Commission's decision, DSD may therefore no longer charge a fee in Germany for that part of the sales packaging bearing the "Green Dot" for which it can be shown that the take-back and recovery obligation, as set out in the German packaging ordinance, has been properly fulfilled by another party, be that a competing system or a self-management solution.

The Commission would normally levy a fine against an undertaking which had abused its dominant position in this way. In this case, however, the Commission recognised that DSD could not easily assess, on the basis of previous decisions of the Commission or the European Court of Justice, the compatibility of its behaviour with the competition rules of the Treaty. Following the clarifications given in this decision, the Commission will not hesitate in the future to bring proceedings in similar cases and, where necessary, to impose fines.

With this decision, the Commission has laid down recognisable conditions to allow competition and a better quality of service in the area of collection and recovery of used sales packaging in Germany. Realistic possibilities of market

entry and growth now exist for both competing systems and self-management solutions. Thus, it is likely that this will lead to an improved choice of service providers for manufacturers and distributors and that the associated improved efficiencies will be passed on to the final consumer. The existence and overall functioning of the DSD system are not put into question by this Commission decision.

DSD had notified a number of agreements to the Commission with a view to obtaining clearance or an exemption from the prohibition on restrictive practices. After lengthy, informal discussions, the Commission opened a formal investigation in this case on 25 October 1996. Following the publication in the Official Journal on March 27, 1997 of the main contents of the DSD notification, one of the comments received from third parties was that the notified trade mark agreements could lead to a restriction of competition. This was because it would not be economically viable for undertakings to consider an alternative service to that of DSD because of the double-payment obligation that such an alternative would entail.

On November 15, 1999, hair-care product manufacturers L'Oréal, Wella, Goldwell and Schwarzkopf, the hairdressing supplies industrial association (Industrieverband Friseurbedarf) and the waste disposal contractor Vfw addressed a formal complaint to the Commission. The complainants wished to organise a self-management system for the collection and recycling of packaging of products used by hairdressers and accused DSD of abusive behaviour.

In August 2000, the Commission sent a Statement of Objections to DSD which set out how, in the opinion of the Commission, DSD had infringed Article 82 of the EC Treaty. After the usual procedure, the Commission reached its formal decision. DSD can appeal this decision before the European Court of First Instance in Luxembourg.

The service agreements between DSD and its collectors are not affected by this Article 82 procedure. These agreements, which are central to the original notification under Article 81, have been amended to reduce their duration to the end of 2003 at the latest. In the context of these proceedings, the Commission intends to issue a decision under Article 81 of the EC Treaty during the course of this year. ■

Austrian Airlines and Lufthansa

The Commission has sent Austrian Airlines and Lufthansa a statement of objections formally warning that, as things stand, their plans for co-operation would eliminate competition on a large number of routes between Austria and Germany. The Commission fears that the deal would leave consumers travelling between the two countries with no choice of airline and would lead to higher prices. Source: Commission Statement IP/01/696, dated 15 May 2001

PRICE-FIXING (BANKING): THE BANK CARTEL CASES

Subject: Price-fixing

Industry: Banking

Parties: Various Dutch, Belgian and other Banks (see reports)

Sources: Commission Statements IP/01/554, dated 11 April 2001; IP/01/635, dated 3 May 2001; IP/01/634, dated 3 May 2001; IP/01/650, dated 7 May 2001

(Note. In view of the Commission's commitment to making a success of the Euro, it has understandably cracked down on banks seeking to make an artificial charge for converting currencies from and into Euros. As we have reported in previous issues, the Commission has initiated proceedings against a number of banks forming what it calls the bank cartel; but, in the cases reported below, the proceedings have been abandoned, following a satisfactory outcome. The cases are broadly similar; they are, however, separate from the German bank case reported on page 111 of this issue.)

SNS Bank

The Commission has decided to end cartel proceedings against the Dutch bank SNS, belonging to banking/insurance group SNS Reaal, regarding conversion charges for euro-zone currency notes. This decision comes after SNS Bank decided to abolish its minimum fee of over seven guilders (around €3.2) from the 1st of May and to provide the service free of charge for its accountholders as from next October. In doing this, SNS will set prices independently from a group of Dutch banks, which stand accused of fixing cash conversion tariffs, and provides a cheaper, competitive service for customers ahead of the summer holiday period.

Commenting on this decision, Competition Commissioner Mario Monti said: "This should create no misunderstanding about the Commission's determination to stamp cartels out of the European economy. In the Commission's view SNS's decision to drop the minimum fee will end its suspicious collusive behaviour and will translate into immediate benefits for consumers who will be able to enjoy competitive and, therefore, lower charges. In taking this decision, I also bore in mind the need to come to rapid results for the European consumer due to the imminent introduction of euro notes and coins and the ensuing withdrawal of the participating national currencies which will automatically put an end to the alledged infringement".

The Commission last year started proceedings against banks in seven countries, including the Netherlands, after it gathered evidence that the national groups of banks concerned had colluded to maintain conversion charges at certain levels to minimise losses caused by the introduction of the European single currency, the

euro, on January 1, 1999. Creation of the euro irrevocably fixed the exchange rate of the 12 EU currencies that are part of the single currency, therefore eliminating the buying and selling foreign exchange spread. Price-fixing is one of the cardinal sins of EU antitrust law, irrespective of whether it is aimed at keeping prices artificially high or to minimise a drop in prices because it equally harms the consumer which is deprived of real choice.

With a view to settling the antitrust proceedings with the Commission, SNS decided as from May 1st 2001 that it would no longer charge a minimum fee of 7.50 guilders per transaction which it is accused of having agreed with other Dutch banks. Instead it will apply only a percentage fee of 2.5% on all transactions. The abandonment of the minimum charge means that for the majority of transactions, namely those below 300 guilders, SNS fees will decrease. Furthermore, in anticipation of the arrival of the Euro on 1 January 2002, SNS will offer the service free for its accountholders for the last three months of 2001 for the exchange of amounts up to 3,000 guilders.

In August 2000, the Commission issued a so-called Statement of Objections to the main banking groups in the Netherlands as well as to SNS Bank for an infringement of the competition rules. The banks in the Netherlands were stated to have collectively fixed the tariff structure - a percentage combined with a minimum fee as well as the percentage level for the service of the cash exchange of euro-zone currencies at the counter. In coming to this decision, the Commission took into account the unique and imminent circumstance of the introduction of euro notes and coins. From next January, this market will cease to exist and consumers will no longer need to exchange euro-zone bank notes. SNS's change of behaviour will allow consumers in the Netherlands to benefit from lower tariffs for the exchange of bank notes until the end of the year. The Commission remains determined to pursue all and every anti-competitive practices in the financial sector, including after the introduction of the euro, with particular attention to cross-border money transfers.

Ulster Bank

The Commission has decided to end cartel proceedings against Irish bank Ulster Bank Ltd regarding charges for the exchange of euro-zone bank notes. This decision comes after Ulster Bank decided to abolish its minimum fee of two pounds (around €2.5) and decrease its percentage charge from 2,25% to 1% for all customers as from the 16th May. From October, Ulster Bank will provide the service free of charge for its accountholders for all euro-zone banknotes. Ulster Bank will thus set prices independently from a group of Irish banks which stand accused of fixing cash exchange tariffs and provide a cheaper, competitive service for customers ahead of the summer holiday period.

Ulster Bank is part of a number of banks being investigated in Ireland for suspected cartel involvement in relation to cash exchange charges for euro-zone currencies. Ulster Bank and Bayerische Landesbank Girozentrale are the second and third banks to have announced to the Commission their intention to modify unilaterally their exchange fee structure to break with suspected cartel behaviour.

The first initiative came from Dutch bank SNS, which last month also announced it was dropping its fixed fee and ending fees altogether from October for its accountholders.

Bayerische Landesbank Girozentrale

The Commission has decided to end cartel proceedings against the German bank Bayerische Landesbank Girozentrale regarding charges for the exchange of euro-zone bank notes. This decision comes after Bayerische decided to abolish its minimum charge of €2 (around 4 marks) and decrease its percentage charge from 3,0% to 2,0% for all customers as from 1st May. From the same date, the service will be free for its account holders insofar as the buying of euro-zone bank notes is concerned. Both buying and selling of bank notes will be free for account holders from the 1st of October. In doing this, Bayerische Landesbank will set prices independently from a group of German banks, which stand accused of fixing cash exchange tariffs, and will provide a cheaper, competitive service for customers ahead of the summer holiday period.

Other Dutch and Belgian Banks

The Commission has decided to end cartel proceedings regarding conversion charges for euro-zone currency notes, against Dutch banks ABN AMRO, Fortis Bank Nederland, GWK, ING Bank and Postbank, as well as Belgian banks ABN AMRO Belgium, BBL (Banque Bruxelles Lambert) and Caisse Privée Banque, the latter two belonging to ING Group. This decision comes after these banks individually decided to considerably lower their fees for the general public and to provide the service free of charge later this year. In doing this, the banks are setting prices independently from other banks in the Netherlands and Belgium which the Commission suspects of fixing cash conversion tariffs. More importantly, this will provide a cheaper, competitive service for customers ahead of the summer holiday period. This move by the Dutch and Belgian banks follows on similar steps by other financial institutions (SNS Bank, Netherlands, Ulster Bank, Ireland and Bayerische Landesbank Girozentrale, Germany).

Netherlands

ABN AMRO will offer the service free for all private customers exchanging an amount of maximum €1000 a day. This applies to accountholders and other customers from mid October onward. Furthermore, as from May 15th they will no longer charge a minimum fee of 7.50 guilders (€ 3.4) per transaction. Instead they will apply the existing percentage fee of 2.75% to all transactions, with a new minimum of 3.50 guilders. The lowering of the minimum charge means that for transactions below some 273 guilders (around €124), charges will be reduced. An exception is made to these new conditions for a limited number of offices of ABN AMRO that offer bureau de change services in the restricted passenger area at Schiphol, where the new conditions will apply from 15th October onward.

For Fortis Bank Nederland, the essential features of the new tariffs are that Fortis will in the short term abolish its minimum fee (applying only its percentage fee),

and will offer a free of charge exchange service for its accountholders as from October 1st 2001. GWK Bank , a subsidiary of Fortis Bank Nederland that operates bureaux de change, will lower its fixed fee to 2.50 guilders instead of the current 5 guilders, for transactions up to 750 guilders. The fixed charge will be waived totally for buying and selling of euro-zone currencies as from 1st October 2001. The current percentage fee will continue to apply.

ING Bank and Postbank will reduce, starting May 21st, their minimum charge from 7.50 to 3.50 guilders. The percentage charge of 2.75% and 2% respectively will remain in place. Also, they will, from 1st October 2001, accept euro-zone currencies free of charge from their accountholders, but for the selling of euro-zone currencies to accountholders the above-mentioned percentage fee will still be applied.

Belgium

BBL and Caisse Privée Banque (both belonging to the ING Group), will reduce their minimum fee ,as of Mai 21st, to 45 BEF (€1.1) instead of the current 100 BEF, but the current percentage charge will remain in place. Furthermore, from October, BBL will buy euro-zone currencies free of charge from their accountholders, but for the selling of euro-zone currencies to accountholders the existing percentage fee will still be applied.

ABN AMRO (Belgium) will abolish from 1st June 2001 all fees for its accountholders for the exchange of euro-zone currencies. ■

IATA cargo tariff consultations

In a statement of objections sent to the International Air Transport Association (IATA), the Commission has taken the preliminary view that the IATA cargo tariff consultations restrict competition and are no longer indispensable to provide customers with efficient interlining services within the EEA. IATA has been given two months to respond in writing to the Commission, and it has also the right to request an oral hearing. Until June 1997 cargo tariff consultations benefited from a block exemption under Commission Regulation No 1617/93, which in effect enabled European airlines to agree on tariffs for the carriage of freight. Following the withdrawal of the block exemption by the Commission, IATA notified its cargo tariff consultation system under Council Regulation 3975/87 and applied for an individual exemption. The Commission accepts that cargo tariff conferences facilitate the provision of a comprehensive system of interlining within the EEA but considers that until now IATA has not succeeded in demonstrating that this restrictive system is indispensable to provide customers with efficient interlining services within the EEA. In particular, the tariff conference system is 55 years old and dates from the time air transport markets were strictly regulated. Source: Commission Statement IP/01/694, dated 15 May 2001.

STATE AIDS (BANKING): THE GERMAN BANKS CASE

Subject: State aids

Industry: Banking

Parties: German Public Law Credit Institutions

Source: Commission Statement IP/01/665, dated 8 May 2001

(Note. This is the next step in the previously reported case in which, after complaints from other banks, the Commission is challenging the German system of public support for public credit institutions.)

After intensification in the recent months of the contacts with the German Government on the system of State guarantees for public law credit institutions, the Commission has adopted a decision, proposing to the German Government appropriate measures to render the guarantee system compatible with the State aid rules of the EC Treaty. The German Government is requested to submit by the end of September of this year its proposals for the changes to be made. The decision is the logical next step within the procedure, which started with a letter from the Commission services on 26 January, stating the preliminary opinion of the Commission that the guarantee system constituted existing State aid which is not compatible with the common market. The European Banking Federation had filed a complaint on 21 December 1999. The complaint refers, as examples, to Westdeutsche Landesbank, Stadtsparkasse Köln and Westdeutsche Immobilienbank, but is targeted at the whole system of guarantees.

Today's formal decision confirms that the guarantee system has to be considered as State aid within the meaning of the Treaty: the measures are based on State resources and favour certain groups of undertakings, they distort competition and affect trade within the Community. However, since the system existed already when the EC Treaty entered into force in 1957 the aid qualifies as existing aid for which the Commission can demand only changes for the future: it cannot act retroactively. The German Government now has two months to accept the Commission's request to adapt the system. It then has until the end of September of this year to submit detailed proposals on how to achieve compatibility with the State aid rules of the Treaty. Therefore, the German Government largely keeps the choice of specific solutions, provided they are in conformity with Community law. Under the Commission decision, compatibility should be achieved by 31 March 2002. Recently, the German Government announced that it would be willing to modify the guarantee system considerably. Such change would take place on the basis of a "platform model", which provides for abolishing or modifying the guarantees in a way which would make State interventions subject to Commission control. Within this "platform model" the German Government intends to allow for individual solutions for particular banks. ■

COMMISSION STATEMENT (ELECTRICITY): THE EDF CASE

Subject: Liberalisation

Industry: Electricity distribution

Parties: Electricite de France (EDF)
Montedison

Source: Commission Statement MEMO/01/187, dated 17 may 2001

(Note. Strictly speaking, this is not a case at all. The Competition Commissioner, in this report of his recent speech,, regrets that he does not have power to deal with it as a case under existing competition rules. He has a point: the Commission is working towards complete liberalization of the electricity market but, as he explains, has been frustrated in its aims.)

The expansion of dominant companies in markets still being liberalised such as electricity is a worrying phenomenon, which does not favour competition. However, the Commission does not always have the right to intervene. This is the case in relation to EDF's acquisition of 3.97 percent of Montedison's shares, which does not provide it with any controlling capacity and, therefore, does not have to be notified to the Commission. The Commission does not have a duty or a right to examine it.

I understand the possible frustration provoked by this kind of operation which stems from the perception of an imbalance in the levels of market opening in various EU Member states. The possibility for this asymmetric situation derives from a piece of legislation, the so called electricity liberalisation directive, which was approved by the Member States. This directive sets only minimum liberalisation requirements which are lower than those originally proposed by the Commission while allowing Member States freely and unilaterally to proceed further in the liberalisation process. Most countries have used this possibility to create a more competitive environment for customers in terms of choice and prices. France, on the other hand, stuck to the strict minimum.

The Commission made ambitious proposals in March 2001 to ensure a complete opening of the electricity market by 2005. However, the European Summit of Heads of State and Government in Stockholm, on the initiative of the French, ruled out that deadline. That is a pity, especially since the decision requires only a qualified majority in the Council of Ministers. I personally am concerned to see this tendency by Member States to seek unanimous consent even in areas where the Treaty foresees qualified majority voting. This tendency puts a brake to the creation of a truly single market.

Regarding European competition rules, the Commission has applied and will continue to apply the existing competition rules with the maximum determination. In the last few years we have started several proceedings:
against companies abusing a monopolistic situation in their national markets,
favouring the emergence and strengthening of independent market forces,
to develop cross-border trade between Member States through a number of interconnector related cases.

These cases also involved the French company EDF. For instance, in applying the merger regulation, the European Commission authorised the acquisition of joint control of German electricity company EnBW by EDF and OEW in February only after significant commitments were offered by the parties, including the release of generation capacity by EDF. EDF undertook also to cut many of its links with the French electricity generator CNR, which has now become an independent producer on the French market.

Another case that has raised competition concerns is the EDF/Louis Dreyfus case. EDF envisaged forming a joint venture for the trade of electricity with Louis Dreyfus. The Commission cleared the venture only after EDF had undertaken not to offer trade services in France until the market is effectively open.

The Commission is currently examining the proposed acquisition of Hidrocantabrico by EnBW which is controlled by EdF and, without prejudging the conclusion of the review, I can say that the Commission will attach particular attention to possible competition problems deriving from the elimination of potential competitors of EDF.

The Commission is also closely examining the situation in relation to access to the tranmission networks and transmission capacity allocation methods to make sure there is no favouring of former monopolists over new entrants. Access to the grid and capacity allocation is particularly important for interconnectors among Member States. The Commission has obtained significant guarantees regarding the capacity allocation method in the French/UK interconnector and it is currently investigating the French/Spanish interconnection as well as examining the French/Italian interconnector.

I want to insist again that, in spite of the unsatisfactory state of liberalisation obtained through the legislative route, the Commission is and will continue to make the utmost use of the available instruments under the competition rules and will continue to monitor the markets so that it can move quickly to punish any violations of the rules. ■

The report on the following pages, of the *TNT Traco* case, is taken from the website of the Court of Justice of the European Communities and is freely available. It is subject to correction before publication in the official Reports.

EXCLUSIVITY (EXPRESS MAIL): THE TNT TRACO CASE

Subject: Exclusivity
Trade between Member States
Public undertakings

Industry: Express mail services; postal services

Parties: TNT Traco SpA
Poste Italiane SpA, formerly Ente Poste Italiane
The Italian Government (intervener)
The Commission of the European Communities (intervener)
The EFTA Surveillance Authority (intervener)

Source: Judgment of the Court of Justice of the European Communities, on 17 May 2001, in Case C-340/99 (*TNT Traco SpA v Poste Italiane SpA, formerly Ente Poste Italiane, and Others*)

(Note. This case sheds light on a number of points, including: first, the extent to which a request for a preliminary ruling by the Court of Justice is admissible in a competition case (paragraphs 24-37); second, the principle that an undertaking abuses its dominant position where it charges for its services fees which are unfair or disproportionate to the economic value of the service provided (paragraph 46); and, third, the conditions on which cross-subsidisation of services is necessary and permissible (see, in particular, paragraphs 54 to 57). The case is largely concerned with the relationship between Article 82 (formerly 86) on the abuse of a dominant position and Article 86 (formerly 90) on public undertakings and provides a useful commentary on the previous case law. References to the old and new numbering in the judgment are erratic: caveat lector. The provisions of the EC Treaty governing preliminary rulings by the Court of Justice are contained in Article 234 (formerly 177); here the Court refers to the new numbering.)

Reference to the Court

1. By order of 21 June 1999, received at the Court on 13 September 1999, the Tribunale civile di Genova (Civil District Court, Genoa) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 86 and 90 of the EC Treaty (now Articles 82 EC and 86 EC).

2. That question was raised in proceedings between (i) TNT Traco SpA (TNT Traco), which provides throughout Italy a private service for the collection, carriage and delivery of express mail on behalf of third parties, (ii) Poste Italiane SpA (Poste Italiane) and (iii) three employees of Poste Italiane, concerning a decision by which those employees imposed a fine on TNT Traco pursuant to Article 39 of Presidential Decree No 156 of 29 March 1973 on assent to the single text of the legislative provisions on mail, postal banking services and

telecommunications (GURI No 113 of 3 May 1973, ordinary supplement, hereinafter the Postal Code).

The regulatory framework

3. Article 1 of the Postal Code, headed Exclusive right in respect of postal services and telecommunications provides:
Within the limits of this decree, the State shall have the sole right to provide the following services:
collection, carriage and delivery of letter post;
....

4. Article 7 of the Postal Code provides:
Save for the power reserved to the Minister for Posts and Telecommunications in the cases provided for herein, charges for postal services, postal banking services and telecommunication services shall, as regards domestic services, be laid down by decree of the President of the Republic, on a proposal from the same minister, in consultation with the Treasury Minister, and after hearing the views of the Council of Ministers.

5. Article 8 of the Postal Code provides that charges for postal services and for international postal banking services are set by the Minister for Posts and Telecommunications, in agreement with the Treasury Minister, on the basis of international conventions or agreements entered into with the relevant foreign authorities.

6. Article 39 of the Postal Code, entitled Contraventions of the postal monopoly, provides:
Any person who either directly or through the intermediary of a third party, collects, carries or delivers letter post in breach of Article 1 of this decree is liable to a fineequal to twenty times the amount of the postage rate, subject to a minimum amount of ITL 800.
Any person who habitually entrusts letter post to third parties for carriage or delivery shall be liable to the same penalty.
...
Correspondence conveyed in breach hereof shall be confiscated and immediately delivered to a post office and a report of the breach shall be drawn up at the same time.

7. Article 41 of the Postal Code provides:
Article 39 shall not apply to:
...
(b)the collection, carriage and delivery of letter post in respect of which postage duty has been paid by means of a franking machine or stamps bearing a postmark or directly by the sender by affixing in indelible ink the date on which the carriage commenced;
....

8. Initially, the services referred to in Article 1 of the Postal Code were supplied by the Posts and Telecommunications authorities, which, pursuant to Law No 71 of 29 January 1994 (GURI No 24 of 31 January 1994, Law No 71/94), became a public entity known as Ente Poste Italiane. As a result of Decision No 244/1997 of 18 December 1997 made by the inter-departmental committee on economic planning, Ente Poste Italiane became, with effect from 28 February 1998, a joint stock company called Poste Italiane SpA. All the shares in the company were allocated to the Ministry responsible for the Treasury, the Budget and Economic Planning.

9. Article 2 of Law No 71/94 relating to the activities of Poste Italiane provides that the latter is to carry on the activities and provide the services described in its memorandum and articles of association and in the programme contract to be agreed between the Minister for Posts and Telecommunications and the President of Poste Italiane.

10. Article 6 of the programme contract agreed in 1995 provides:
1. Without prejudice to the guarantee given by [Poste Italiane] to ensure that universal services, whether they are reserved or not, are provided throughout the whole of the national territory, [Poste Italiane] shall identify small peripheral post offices in remote areas which do not guarantee conditions of economic viability and shall arrange management rationalisation measures for them in order to ensure a progressive reduction in the operating losses attributable to each of them.
On the basis of the principle that [Poste Italiane's] business and social functions must remain separate, the parties shall, within three months of the close of each accounting period, determine the extent of the universal-service obligations arising from the retention of the abovementioned offices.
To that end, as regards each small office, it will be necessary to examine only the direct and indirect costs determined on a proper accounting basis and specifically attributable to the office concerned and in respect of which the office's business does not generate any corresponding receipts.
...
3. Where the State lays down certain actions to be taken by [Poste Italiane] which give rise to undue burdens or the application of specific charges, the State shall none the less ensure that [Poste Italiane's] expenditure or loss of revenue is made good.
...

11. It is apparent from the order for reference that it was in order to ensure 'fair competitive conditions in relation to rates charged for comparable services by competing undertakings that Poste Italiane undertook in Article 11 of the programme contract to adopt an accounting system with separate accounts designed to allow ... in particular, verification that there are neither cross-subsidies between the reserved services and the non-reserved services nor discriminatory practices.

12. As is clear from the written observations submitted to the Court by the parties to the main proceedings and by the Italian Government, that obligation was confirmed by Law No 662 of 23 December 1996 relating to rationalisation

measures concerning public finances (GURI No 303 of 28 December 1996, ordinary supplement No 233), the last sentence of Article 2(19) of which provides:
The body concerned is required to make separate accounting entries, in particular segregating the expenditure and income relating to services supplied under the statutory monopoly from that relating to services supplied on the open market.

13. Article 41 of the Postal Code was repealed by Legislative Decree No 261 of 22 July 1999 (GURI No 182 of 5 August 1999, 'Decree No 261/99), which entered into force on 6 August 1999 and transposed into Italian law Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service (OJ 1998 L 15, p. 14).

14. Article 1 of Directive 97/67 provides:
This Directive establishes common rules concerning:
-the provision of a universal postal service within the Community,
- the criteria defining the services which may be reserved for universal service providers and the conditions governing the provision of non-reserved services,
-tariff principles and transparency of accounts for universal service provision,
-the setting of quality standards for universal service provision and the setting-up of a system to ensure compliance with those standards,
-the harmonisation of technical standards,
-the creation of independent national regulatory authorities.

15. Article 9(4) of Directive 97/67 provides that, in order to ensure that the universal service (as defined in Article 3 thereof) is safeguarded, Member States may establish a compensation fund intended to compensate the universal service provider for any unfair financial burden arising from the obligation to supply that service. That fund may be financed by contributions from operators who are authorised to supply non-reserved services, irrespective of whether those services fall within the universal service.

16. Furthermore, Article 14 of Directive 97/67 requires Member States to bring into force the measures necessary to ensure that, within two years of the date of its entry into force, the universal service providers ensure that there are separate accounts within their internal accounting systems for the various reserved and non-reserved services. As is clear from the 28th recital in the preamble to Directive 97/67, separate accounts are necessary in order to introduce transparency as regards the actual costs of the various services and to ensure that cross-subsidies from the reserved sector to the non-reserved sector do not adversely affect the conditions of competition in the latter.

17. Directive 97/67 entered into force, pursuant to Article 25 thereof, on 10 February 1998. In accordance with Article 24 of the directive, the Member States were required to bring into force the laws, regulations and administrative provisions necessary to comply with it not later than 12 months after the date of its entry into force.

The dispute in the main proceedings and the question referred for a preliminary ruling

18. On 27 February 1997, TNT Traco was inspected by three employees of Poste Italiane. Having ascertained that mail entrusted to TNT Traco for express delivery had been collected, carried and delivered in breach of Article 1 of the Postal Code, those employees imposed a fine of ITL 46 331 000 on TNT Traco pursuant to Article 39 of the Postal Code.

19. In its order for reference, the national court finds that TNT Traco's express mail service was distinguished by speed, certainty and personalised delivery to the addressee and that it could thus be clearly differentiated from the ordinary postal delivery service provided by Poste Italiane as part of the universal service. It considers that an express mail service of that kind, whether it is provided by TNT Traco, Poste Italiane or any other undertaking, includes a value added service which is not 'supplementary to a basic service but is a different and independent service distinguished by its features, qualities and cost.

20. TNT Traco brought an action before the Tribunal civile di Genova against both Poste Italiane and the three employees who had carried out the inspection referred to in paragraph 18 of this judgment. TNT Traco relied on the fact that both the exclusive rights enjoyed by Poste Italiane and the conduct of Poste Italiane and its employees were incompatible with Articles 86 and 90 of the Treaty. It claims, first, that the rules of free competition laid down in those provisions should be applied to the express mail service that it provides. It goes on to seek payment from Poste Italiane of compensation for the damage, estimated at over ITL 500 000 000, suffered as a result of the unlawful levying of the fine imposed on it. Finally, it seeks payment from Poste Italiane and its employees of compensation for the damage, estimated at over ITL 100 000 000, suffered as a result of those employees' unlawful inspection and acquisition of commercial information at its offices in breach of Article 2598 of the Italian Civil Code relating to unfair competition.

21. On 8 June 1999 the Tribunale civile di Genova gave judgment in part and ordered Poste Italiane to repay TNT Traco ITL 46 331 000 by way of compensation for damage caused by the levying of the fine. It ruled in that regard that it had been unlawful to levy the fine, inasmuch as the supervisory, regulatory and disciplinary powers previously held by Poste Italiane had been transferred to the Ministry of Posts and Telecommunications by Law No 71/94. Since it went on to hold, first, that Poste Italiane alone was liable for the unlawful acts of its employees and for any damages resulting therefrom and, second, that no evidence had been adduced to show that the names of TNT Traco's clients had been improperly used in such a way as to amount to unfair competition for the purposes of Article 2598 of the Italian Civil Code, the Tribunale dismissed TNT Traco's claims against Poste Italiane's employees and ordered TNT Traco to pay their costs. It finally decided, by a separate order, to refer a question to the Court of Justice for a preliminary ruling under Article 234 EC and to rule on costs as between TNT Traco and Poste Italiane in its final judgment.

22. The national court does not rule out the possibility that the levying of postal dues may be compatible with Community law if it applies, by reference to objective criteria, to all private persons operating in the market in express mail and if it is justified by the need to secure the universal service and to cover unprofitable areas. It observes, however, that the Italian Republic grants to Poste Italiane, in addition to the proceeds of the postal dues at issue in the main proceedings, direct subsidies designed to cover the costs entailed by the obligation to provide a universal service. It also observes that prior to the transposition of Directive 97/67, Italian law did not contain any compensatory or regulatory mechanism (other than the requirement that Poste Italiane should maintain separate accounts), which, like the mechanism in Article 9(4) of the directive, would have enabled it to ensure on a permanent basis that compensation to be paid in respect of universal and reserved services did not exceed what was necessary and did not unlawfully become cross-subsidisation of non-universal and non-reserved services.

23. In those circumstances the Tribunale civile di Genova deemed it necessary and relevant, for the purposes of giving judgment in the main proceedings, to refer a question to the Court for a preliminary ruling. Consequently, by order of 21 June 1999, it decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:
Do the provisions of the EC Treaty, and in particular Articles 86 and 90 thereof, preclude a Member State, in organising its postal service, from maintaining in force legislation which, though distinguishing between so-called universal services in respect of which exclusive rights are conferred on a private-law undertaking and non-universal services offered and provided on the open market:
(a)requires undertakings, other than that on which the monopoly to operate the universal service has been conferred, to pay, even when providing non-universal or value-added services, the postal dues payable for the basic ordinary postal service, which in such a case is not in fact provided by the monopoly-holder;
(b)directly allocates the proceeds of those dues to the undertaking entrusted with the operation of the universal service, without there being any compensatory or regulatory mechanism designed to ensure that there is no allocation of cross-subsidies to non-universal services?

Admissibility

24. Poste Italiane and the Italian Government submit principally that the request for a preliminary ruling is inadmissible.

25. Poste Italiane asserts, first, that the question referred is no longer relevant. The only claim on which the national court reserved judgment appears to be the claim relating to the inapplicability of the postal monopoly provided for in the Postal Code, in so far as it is incompatible with the provisions of the EC Treaty. Following the amendments made to the legislation in the process of implementing Directive 97/67 and account being taken, in particular, of the repeal of Article 41 of the Postal Code, the question of whether the monopoly is compatible with the Treaty has become devoid of purpose.

26. Poste Italiane submits, in second place, that even if the question raised by the national court were held to be relevant, the Court's answer would be so obvious that, in accordance with the doctrine of *acte clair* (see Case 283/81 *Cilfit and Others*, paragraph 16), a preliminary ruling would no longer be necessary. In fact, the Court's answer can be no different from that given in Case C-320/91 *Corbeau*. In that case, the Court held that it was for the national court to assess to what extent competition in the special postal services sector, dissociable from the basic postal service, could be restricted, or even prevented, in order not to compromise the economic stability of the operator holding the exclusive right to operate that service.

27. For its part, the Italian Government submits that the national court has failed to specify in the order for reference the nature of the conduct allegedly constituting an abuse of a dominant position within the meaning of Article 86 of the Treaty and in respect of which Poste Italiane is allegedly liable.

28. It also submits that, in ordering Poste Italiane, by judgment in part, to repay the sum improperly collected on the basis of Article 39 of the Postal Code, the national court must necessarily have refrained from applying Articles 1, 39 and 41 of the Code, with the result that it is no longer necessary to answer the question referred for a preliminary ruling in order to give judgment in the main proceedings.

29. Without making a formal submission that the reference for a preliminary ruling is inadmissible, TNT Traco also expresses doubt as to its usefulness, given that Decree No 261/99 implementing Directive 97/67 has entered into force.

30. The Court observes that, according to settled case-law, in the context of the cooperation between the Court of Justice and the national courts provided for by Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see, inter alia, Case C-415/93 *Bosman*, paragraph 59, and Case C-379/98 *PreussenElektra*, paragraph 38).

31. Nevertheless, the Court has also stated that, in exceptional circumstances, it may examine the conditions in which the case was referred to it by the national court, in order to determine whether it has jurisdiction (see, to that effect, Case 244/80 *Foglia*, paragraph 21). The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the elements of fact or law necessary to enable it to give a useful answer to the questions submitted to it (see, inter alia, *Bosman*, paragraph 61, and *PreussenElektra*, paragraph 39).

32. In the present case, the Court would point out that it is apparent from the case-file in the main proceedings that the action is still pending before the national court. That court has specifically stated that the judgment by which it ordered, inter alia, Poste Italiane to repay TNT Traco the amount of the fine imposed is only a judgment as to part and that a preliminary reference seems to it to be necessary and relevant in order to give final judgment in the action before it.

33. In that regard, the fact that changes have been made to the postal regime that operated in Italy at the material time and that, in particular, Article 41 of the Postal Code has been repealed has not deprived the request for a preliminary ruling of purpose.

34. First, as the national court has itself pointed out, the facts in the dispute in the main proceedings predate the adoption of Directive 97/67 and, a fortiori, the entry into force of Decree No 261/99. Second, it is for the national court alone to withdraw its request for a preliminary ruling if it deems that such a ruling is no longer necessary to enable it to decide the action before it, since the plaintiff in the main proceedings may cause the reference to be withdrawn by discontinuing its action.

35. Furthermore, far from preventing a national court from referring questions to the Court under Article 234 EC, the case-law as stated in *Cilfit* (cited above) - assuming that it is relevant in the present case - gives the national court sole responsibility for determining whether the correct application of Community law is so obvious as to leave no scope for any reasonable doubt and for deciding, as a result, to refrain from referring to the Court of Justice a question concerning the interpretation of Community law which has been raised before it.

36. As regards the Italian Government's contention that the facts are inaccurate, it is sufficient to note that the question referred by the national court describes the conduct which it asks the Court to consider in order to ascertain whether it may be prohibited as an abuse of a dominant position under Article 86, in conjunction with Article 90, of the Treaty.

37. It follows from the foregoing considerations that it is necessary to reply to the question referred by the national court.

The question referred for a preliminary ruling

38. By its question, the national court is essentially asking whether Articles 86 and 90 of the Treaty, when read together, preclude legislation of a Member State which grants a private-law undertaking an exclusive right to operate the universal postal service from making the right of any other economic operator to provide an express mail service not forming part of the universal service subject to payment of postal dues equivalent to the postage charge normally payable to the undertaking responsible for the universal service, where the legislation contains no compensatory and regulatory mechanism designed to prevent that undertaking from allocating cross-subsidies to its own non-universal activities.

39. In that regard, the first point to be made is that an undertaking like Poste Italiane, in its capacity as a public economic entity or, subsequently, as a joint stock company in which the State is the only shareholder, is a public undertaking for the purposes of Article 90(1) of the Treaty.

40. As TNT Traco, the EFTA Surveillance Authority and the Commission have submitted, Poste Italiane must also be considered as an undertaking which has been granted by the Member State concerned special or exclusive rights within the meaning of Article 90(1) of the Treaty, having been given the exclusive right to collect, carry and deliver mail on that Member State's territory, without being required to pay - as must all other persons providing the same services - postal dues equivalent to the postage charge normally payable.

The prohibition in Article 90(1) of the Treaty

41. Article 90(1) of the Treaty states that in the case of public undertakings and undertakings to which they grant special or exclusive rights, Member States may neither enact nor maintain in force any measure contrary to the rules of the Treaty, in particular to those provided for in Article 86.

42. In so far as it may affect trade between Member States, the abuse of a dominant position within the common market or in a substantial part of it is prohibited by Article 86 of the Treaty.

43. In that regard, it must first be noted that it is not in dispute that Poste Italiane, which is the holder of the special or exclusive rights described in paragraph 40 of this judgment, has a dominant position within the meaning of Article 86 of the Treaty, since the case-law indicates that the territory of a Member State over which a dominant position extends is capable of constituting a substantial part of the common market (see, to that effect, Case C-203/96 *Dusseldorp and Others*, paragraph 60; Case C-7/97 *Bronner*, paragraph 36; and Case C-67/96 *Albany*, paragraph 92).

44. In second place, it must be observed that, although merely creating a dominant position by the grant of special or exclusive rights is not, in itself, incompatible with Article 86 of the Treaty, a Member State breaches the prohibitions laid down by Article 90(1) of the Treaty in conjunction with Article 86 if it adopts any law, regulation or administrative provision that creates a situation in which an undertaking on which it has conferred exclusive rights cannot avoid abusing its dominant position (see to that effect, in particular, Case C-242/95 *GT-Link*, paragraph 33; and *Dusseldorp*, paragraph 61).

45. In that regard, it is important to bear in mind that the national legislation at issue in the main proceedings requires economic operators providing an express mail service to pay Poste Italiane postal dues equivalent to the postage charge normally payable by the latter's customers, without Poste Italiane being required to provide a service of any description to those operators.

46. As the Court has already held, an undertaking abuses its dominant position where it charges for its services fees which are unfair or disproportionate to the economic value of the service provided (see, inter alia, Case C-323/93 *Centre d'Insémination de la Crespelle*, paragraph 25; and *GT-Link*, cited above, paragraph 39).

47. That must be all the more so where an undertaking in a dominant position is paid for services which it has not itself supplied.

48. It follows that legislation of the kind at issue in the main proceedings creates a situation in which the undertaking which has been given special or exclusive rights cannot avoid abusing its dominant position within the meaning of Article 86 of the Treaty.

49. It must, however, be observed in third place that, as is apparent from the wording of Article 86 of the Treaty, such legislation is prohibited under Articles 86 and 90(1) of the Treaty only in so far as trade between Member States may be affected.

50. That would be the case, for example, if economic operators supplying express mail services between the Italian Republic and another Member State were also obliged to pay Poste Italiane the postal dues at issue in the main proceedings. It is for the national court to ascertain whether that is the case.

Justification under Article 90(2) of the Treaty

51. Poste Italiane and the Italian Government submit that the obligation to pay the postal dues at issue in the main proceedings, even when it applies to operators of an express mail service not forming part of the universal service, is in any event justified under Article 90(2) of the Treaty because it is necessary in order to safeguard the economic stability of the undertaking entrusted with the operation of the universal postal service.

52. In that regard, it must be noted, first, that the combined effect of paragraphs (1) and (2) of Article 90 of the Treaty is that paragraph (2) may be relied upon to justify the grant by a Member State to an undertaking entrusted with the operation of services of general economic interest of special or exclusive rights which are contrary to, inter alia, Article 86 of the Treaty, to the extent to which performance of the particular task assigned to that undertaking can be assured only through the grant of such rights and provided that the development of trade is not affected to such an extent as would be contrary to the interests of the Community (see to that effect, in particular, Case C-209/98 *Sydhavnens Sten & Grus*, paragraph 74).

53. Second, it is necessary to point out that an undertaking like Poste Italiane, responsible by virtue of the legislation of a Member State for securing the universal postal service, which entails the duty to collect, carry and distribute post throughout the territory of the Member State concerned irrespective of the profitability of the sector being served, constitutes an undertaking entrusted with

the operation of services of general economic interest for the purposes of Article 90(2) of the Treaty.

54. Third, it is apparent from the case-law of the Court that it is not necessary, in order for the conditions for the application of Article 90(2) of the Treaty to be fulfilled, that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest should be threatened. It is sufficient that, in the absence of the rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, defined by reference to the obligations and constraints to which it is subject, or that maintenance of those rights is necessary to enable the holder of them to perform tasks of general economic interest which have been assigned to it under economically acceptable conditions (see, in particular, *Albany*, cited above, paragraph 107).

55. To that end, it may prove necessary not only to permit the undertaking entrusted with the task, in the general interest, of operating the universal service to offset profitable sectors against less profitable sectors (see to that effect, in particular, *Corbeau*, cited above, paragraph 17), but also to require suppliers of postal services not forming part of the universal service to contribute, by paying postal dues of the kind at issue in the main proceedings, to the financing of the universal service and in that way to enable the undertaking entrusted with that task to perform it in conditions of economic stability.

56. It must, however, be observed that, since Article 90(2) is a provision which permits, in certain circumstances, derogation from the rules of the Treaty, it must be restrictively interpreted (see, to that effect, *GT-Link*, cited above, paragraph 50).

57. Therefore, Article 90(2) of the Treaty does not allow the total proceeds from postal dues of the kind at issue in the main proceedings, which are paid by economic operators supplying an express mail service not forming part of the universal service, to exceed the amount necessary to offset any losses which may be incurred in the operation of the universal postal service by the undertaking responsible therefor.

58. In those circumstances, the undertaking responsible for the universal postal service must also be required, when itself supplying an express mail service not forming part of that service, to pay the postal dues. It must also ensure that neither all nor part of the costs of its express mail service are subsidised by the universal service, lest charges for the universal service and, consequently, the potential losses of that service be improperly increased.

59. It is for the national court to ascertain whether those conditions are fulfilled, since it is incumbent on the Member State or the undertaking which seeks to rely on Article 90(2) of the Treaty to show that the conditions for application of that provision are fulfilled (see to that effect, in particular, Case C-159/94 *Commission v France*, paragraph 94).

60. In that regard, it is clear from the case-law of the Court that, in the absence of any Community legislation on the subject, evidence of a breach of Article 86 of the Treaty may be adduced in accordance with the rules of the domestic legal system of the Member State concerned, provided that those rules are not less favourable than those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by that provision (see, to that effect, *GT-Link*, paragraphs 23, 24, 26 and 27).

61. The same principles apply when, on the basis of Article 90(2) of the Treaty, a Member State, or the undertaking to whom it has entrusted a task in the general interest for the purposes of that provision, seeks to show that the grant to that undertaking of special or exclusive rights contrary to Article 86 of the Treaty is necessary.

62. It follows that the absence at the material time of any compensatory or regulatory mechanism designed to ensure that the undertaking responsible for operation of the universal service did not allocate cross-subsidies to its non-universal activities is not necessarily sufficient to establish that the conditions necessary for Article 90(2) of the Treaty to apply were not met.

63. In view of the foregoing considerations, the question must be answered as follows:
-in so far as trade between Member States may be affected, Article 86 of the Treaty, read in conjunction with Article 90 thereof, precludes legislation of a Member State which grants a private-law undertaking the exclusive right to operate the universal postal service from making the right of any other economic operator to provide an express mail service not forming part of the universal service subject to payment of postal dues equivalent to the postage charge normally payable to the undertaking responsible for the universal service, unless it can be shown that the proceeds of such payment are necessary to enable the undertaking to operate the universal postal service in economically acceptable conditions and that the undertaking is required to pay the same dues when itself providing an express mail service not forming part of the universal service;
-that may be proved in accordance with the rules of the domestic legal system of the Member State concerned, provided that those rules are not less favourable than those governing similar domestic actions and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law.

Costs

64. The costs incurred by the Italian Government, the Commission and the EFTA Surveillance Authority, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

[The Court's formal ruling is in the same terms as paragraph 63 of the judgment.]